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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

KERRI WALSH JENNINGS,

Plaintiff and Respondent,

v.

AOS GROUP, LP

Defendant and Appellant.

B289681

(Los Angeles County
Super. Ct. No. BC657250)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Fortis, Matthew A. Berliner for Defendant and Appellant.

Kendall Brill & Kelly, Alan Jay Weil and Sarah E. Moses for Plaintiff and Respondent.

INTRODUCTION

Plaintiff and respondent Kerri Walsh Jennings, a professional beach volleyball player, three-time Olympic gold medalist, and one-time Olympic bronze medalist, sued defendant and appellant AOS Group, LP (AOS) for breach of contract, seeking damages and attorneys' fees. Months after Walsh Jennings filed the complaint, AOS paid her the damages demanded by the complaint, plus interest and court costs. The parties did not, however, enter into a settlement agreement or release. Walsh Jennings later filed a motion for attorneys' fees based on an indemnity provision in the contract. The trial court granted Walsh Jennings' motion and awarded the total fees requested.

AOS appeals, contending the contractual language relied upon is a third party indemnity provision that does not create a right to prevailing party attorneys' fees in litigation between the parties to the contract. Alternatively, AOS contends the attorneys' fees awarded were unreasonable. We reject both contentions and affirm. We also find the contract entitles Walsh Jennings to an award of attorneys' fees on appeal, and remand to the trial court to calculate the amount of those fees.

FACTUAL AND PROCEDURAL BACKGROUND

Walsh Jennings licensed her name and likeness to AOS in exchange for \$150,000. They entered into a Talent Services Agreement (Agreement), which contained an indemnification provision, stating in relevant part: "[AOS] agrees to defend, indemnify and hold harmless [Walsh Jennings], her agent, representatives, and employees from and against any and all

damages, claims, suits, actions judgments, costs and expenses including reasonable [attorneys'] fees, arising out of: (a) any material breach by [AOS] of this Agreement or any representation or warranty made hereunder”

Walsh Jennings filed a complaint for breach of contract, alleging AOS failed to pay her \$150,000 in breach of the express terms of the Agreement.¹ Walsh Jennings sought compensatory damages and attorneys’ fees and costs. AOS moved to strike Walsh Jennings’ prayer for attorneys’ fees, arguing the Agreement did not contain an attorneys’ fees provision for a dispute between the contracting parties. In opposition, Walsh Jennings relied on the indemnity provision in the Agreement to argue the Agreement expressly provided for the payment of attorneys’ fees to the prevailing party. The court agreed with Walsh Jennings and denied the motion.

AOS answered the complaint and ultimately paid Walsh Jennings the amount she claimed was due under the Agreement, plus interest and costs. As noted above, the parties did not enter into a settlement agreement, but AOS acknowledged Walsh Jennings could move for attorneys’ fees. AOS opposed Walsh Jennings’ motion, again arguing the Agreement did not allow for attorneys’ fees to Walsh Jennings as the prevailing party in a dispute with AOS, and the requested fees were unreasonable. Neither party submitted any extrinsic evidence related to the Agreement or its meaning.

¹ Walsh Jennings originally sued AVP, Inc. because it is identified as the named party to the Agreement. Walsh Jennings added AOS as a Doe Defendant after it admitted it was the proper defendant.

The court declined to revisit its prior ruling on AOS's motion to strike, found Walsh Jennings' requested fees were reasonable, and entered judgment in favor of Walsh Jennings for the full amount of the attorneys' fees requested (\$92,726). AOS appeals from the judgment.

DISCUSSION

I. The Agreement's Indemnity Provision is Not Limited to Third Party Claims

"Interpretation of a written contract is a question of law for the court unless that interpretation depends upon resolving a conflict in properly admitted extrinsic evidence." (*Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 599 (*Alki Partners*).) Here, the trial court interpreted the Agreement without consideration of any extrinsic evidence. Therefore, we exercise our independent judgment in determining whether the indemnification provision in the Agreement permits Walsh Jennings to recover attorneys' fees in her action against AOS for breach of contract. We hold it does.

"Although indemnity generally relates to third party claims, 'this general rule does not apply if the parties to a contract use the term "indemnity" to include direct liability as well as third party liability.'" (*Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010, 1024 (*Zalkind*).) "The indemnity provisions of a contract are to be construed under the same rules for interpreting contracts, "with a view to determining the actual intent of the parties.'" (*Id.* at p. 1025.)

In concluding the indemnification provision here applied to direct claims between the parties, the trial court relied on *Wilshire-Doheny Associates, Ltd. v. Shapiro* (2000) 83

Cal.App.4th 1380 (*Wilshire-Doheny*). In that case, a corporation agreed, in three indemnity provisions, to indemnify two of its corporate officers for any claims or action brought against them in their capacity as corporate officers. (*Id.* at pp. 1387, 1394-1396.) The corporation later sued the two officers, asserting claims arising out of their conduct as corporate officers. (*Id.* at pp. 1385-1386.) The *Wilshire-Doheny* court held the indemnification provisions afforded a right to attorneys' fees in an action on the contract, stating "[t]here is nothing in the language of any of the three indemnity provisions specifically limiting their application to third party lawsuits." (*Id.* at p. 1396.)

Zalkind, *supra*, 194 Cal.App.4th 1010 is also instructive. The contract in *Zalkind* stated the "Buyer shall indemnify, hold harmless and defend the Selling Parties . . . from and against any and all Damages that arise from or are in connection with: [¶] . . . [¶] . . . Any breach or default by the Buyer of its covenants or agreements contained in this Agreement." (*Id.* at p. 1022.) The contract defined "Damages" as "(i) demands, claims, actions, suits, investigations and legal or other proceedings brought against any indemnified party . . . and (ii) all liabilities, damages, losses, . . . costs and expenses (including . . . reasonable attorneys' . . . fees . . .) incurred by any indemnified party" (*Id.* at p. 1023, italics omitted.) The *Zalkind* court concluded the provision was "broadly worded" and "does not limit indemnification to third party claims and extends indemnification to 'any and all' damages incurred by [the plaintiffs] arising out of [the defendant's] breach of the Asset Purchase Agreement." (*Id.* at p. 1027.)

The indemnification provision here similarly provides that AOS agrees to "defend, indemnify, and hold harmless [Walsh

Jennings]” from and against “any and all” damages, claims and actions “including reasonable [attorneys’] fees” arising out of “any material breach by [AOS] of this Agreement.” As in *Zalkind*, this language does not limit indemnification to third party claims and extends indemnification to “any and all” damages incurred by Walsh Jennings arising out of AOS’s breach of the Agreement. (See also *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 554-555 [parties’ agreement to indemnify one another for breaches of contractual representations, warranties, or covenants encompassed direct claims]; *Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 508-509 [subcontractor’s agreement to indemnify contractor for losses incurred “on account of any breach of [subcontractor’s] obligations and covenants” entitled contractor to recover attorneys’ fees in breach of contract action with subcontractor].) Had the parties intended to narrow the clause to cover only third-party claims, they could have done so expressly. (*In re Marriage of Vaughn* (2018) 29 Cal.App.5th 451, 460.) They did not.

AOS urges us to follow cases where indemnity provisions were limited to third party claims. But none of those cases involved indemnity provisions providing for attorneys’ fees incurred in actions against the other contracting party for breach of the contract itself. (See e.g. *Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 Cal.App.4th 14, 19 [indemnitor promised to indemnify “against all claims, damages, losses and expenses including attorney fees arising out of the performance of the work described herein”]; *Myers Building Industries, LTD. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 963-964 [indemnifying “all claims . . . and expenses, including . . . [attorneys’] fees, arising out of . . . the performance of the Work”];

Alki Partners, supra, 4 Cal.App.5th at p. 598 [indemnity for any and all damages “resulting in any way from the performance or non-performance of [contracting party’s] duties hereunder . . .”].) The indemnity provision here expressly permits recovery of attorneys’ fees arising out of “any material breach by AOS of this Agreement.” Accordingly, we conclude the trial court properly interpreted the indemnity provision to provide for attorneys’ fees in this case.

II. The Trial Court Did Not Abuse Its Discretion in Determining the Attorneys’ Fee Award

Under Civil Code section 1717, subdivision (a), “reasonable attorney’s fees shall be fixed by the court . . .” in an action “where the contract specifically provides that attorney’s fees and costs . . . shall be awarded” Because an award of attorneys’ fees under section 1717 is governed by equitable principles, “the trial court has broad authority to determine the amount of a reasonable fee.” (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) The trial judge “is the best judge of the value of professional services rendered in his [or her] court, and while his [or her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.” [Citations.]” (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) Thus, we review the court’s determination of reasonable attorneys’ fees for abuse of discretion. (*Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691.)

Here, Walsh Jennings supported her request for \$92,726 in attorneys’ fees with two declarations from her lead counsel (Mr. Weil) and billing records indicating her attorneys and paralegals

spent 141 hours litigating the matter. Mr. Weil detailed his work over the year his firm was retained by Walsh Jennings, including engaging in pre-litigation attempts to obtain payment of the amounts owed, drafting the complaint, opposing AOS's motion to strike, researching which entity was the proper defendant, and serving written discovery and deposition notices. For this work, Mr. Weil charged the following hourly rates: \$790 in 2017 and \$850 in 2018 for Mr. Weil, discounted from his standard rate of \$950; \$360-\$395 for the associate, discounted from \$490; and \$290 for the paralegals, discounted from \$300. Mr. Weil participated in the determination and adoption of the hourly billing rates for all attorneys at his firm, relying on survey and empirical data of billing rates in the market, information on billing rates he obtained in the course of representing other lawyers and law firms, and publicly available rate data.

The very experienced trial judge found "the hourly rates and hours are reasonable." Regarding the hourly rates, Judge Fahey explained: "I am very familiar with the market rates of lawyers in this town. And there are few of them that have been members of the Bar longer than I have. Mr. Weil is one of them. But I recently approved fees for Latham and Gibson and Munger in excess of [\$]1200. Candidly, I think Mr. Weil is in that category. You may disagree, but he's an experienced, very capable lawyer."

AOS contends the award is excessive, challenging both the time spent by Mr. Weil and his associate on various tasks and the hourly rates. AOS also challenges specific time entries for communicating with the client (total of 19 hours), certain "heavily redacted time entries," and block billing. These complaints do not warrant reversal under the deferential

standard of review applicable here. AOS has failed to carry its burden to show the trial court's award of \$92,726 as attorneys' fees and costs constituted an abuse of discretion.

III. Walsh Jennings Is Awarded Her Attorneys' Fees On Appeal

We sent a letter to counsel for the parties, under Government Code section 68081, soliciting their views on whether Walsh Jennings should be entitled to her attorneys' fees on appeal. We reviewed the parties' briefs and hold that she is, for the reasons discussed above. (See *Serrano v. Unruh* (1982) 32 Cal.3d 621, 637 ["it is established that fees, if recoverable at all – pursuant either to statute or parties' agreement – are available for services at trial and on appeal."].)

DISPOSITION

The judgment is affirmed. Walsh Jennings is awarded her costs and attorneys' fees on appeal. The matter is remanded to the trial court for its determination of the amount of an award of attorneys' fees on appeal to Walsh Jennings, and entry of an order awarding those fees.

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CURREY, J.

WE CONCUR:

WILLHITE, Acting P. J.

COLLINS, J.